CHEW TENG CHEONG & ANOR.

v.

PANG CHOON KONG

FEDERAL COURT, JOHOR BAHRU
RAJA AZLAN SHAH CJ (MALAYA)
ABDUL HAMID OMAR FJ
MOHD. YUSOFF MOHAMED J
[CIVIL APPEAL NO. 13 OF 1980]
8 FEBRUARY 1981

CONTRACT: *Estate agency - Remuneration - Liability to pay - Performance and construction of contract.*

The appellants introduced the respondent to one Au Ah Wah who had rights in timber-land in Pahang. An agreement ("the 20 March Agreement") was drawn between the respondent and Au Ah Wah for the transfer of all the latter's rights in the timber-land to the respondent. The obligation of the respondent towards the appellants as introducers was incorporated in another agreement ("the 31 March Agreement"). The appellants sued on this agreement for the RM900,000 remuneration promised. The respondent's defence was that Au Ah Wah had no rights to the timber-land as it belonged to 30 licensees, that the 20 March 1973 Agreement was conditional upon the consent of the 30 licensees and the approval of the Government, which Au Ah Wah had failed to obtain; that there was a failure of consideration and that the 31 March Agreement was bad in law. On the claim being dismissed, the appellants appealed. The issue before the Court was whether Au Ah Wah had performed his contract with the respondent.

Held:

[1] The law to be applied was the law of estate agents and the claim of the appellants depended on the proper construction to be given to the 31 March Agreement. Where an agency contract provides that the agent earns his remuneration upon bringing about a certain transaction he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause, of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. (*Sushames v. Cumming* [1962] NZLR 920 at p. 925; *Tong Lee Hua v. Yong Kah Chin* [1979] 1 MLJ 233 FC).

[2] It was clear on all the evidence before the Court that Au Ah Wah had performed his contract with the respondent and that the obligation of the respondent to pay the appellants had crystallised. The respondent had come into the picture through the introduction of the appellants and had obtained benefits through the instrumentality of Au Ah Wah.

[Appeal allowed.]

Cases referred to:
Sushames v. Cumming [1962] NZLR 920
Tong Lee Hua v. Yong Kah Chin [1979] 1 MLJ 233
Tribe v. Taylor [1876] 1 CPD 505
Miller v. Radford [1903] 19 TLR 575
Burchell v. Gowrie And Blockhouse Collieries Ltd. [1910] AC 614
Symons v. Callil [1923] VLR 49
Green v. Bartlett [1863] 14 CB (NS) 681
Hansen Real Estate v. Jones & Jones [1980] NZLJ 284

For the appellants - Upali Masacorale (S. Sagadeva with him); M/s. Jackson & Masacorale
For the respondent - G.S. Nijar (Lim Cheun Ren with him); M/s. Yeow & Chin

JUDGMENT

Raja Azlan Shah CJ (Malaya):

The subject matter of this appeal is an area of some 18,000 acres of timber-land in Pahang. The profits to be made were enormous - they were said to be RM18,000,000. So when it was noised about that one Au Ah Wah had the rights to this area, his acquaintance was eagerly sought. Those who did not know him personally sought therefore introductions from those who knew and were prepared to pay considerable sums for the introduction.

The appellants and one Lim Wyen Pang who was one of the plaintiffs in the action but chose not to appeal from the dismissal of their claims introduced the respondent to Au Ah Wah. Arising from that introduction, an agreement was drawn up between the respondent and Au Ah Wah on 20 March 1973 (the 20 March Agreement) for the transfer of all his rights in the timber-land to the respondent. We shall refer more fully to the terms of this Agreement later. The obligation of the respondent to the introducers was incorporated in another Agreement between them on 31 March 1973 (the 31 March Agreement). On this agreement the appellants and Lin Wyen Pang sued for the RM900,000 promised to them therein. The High Court dismissed their claim and they now appeal to this Court.

The law to be applied is therefore the law of estate agents. Where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. “The effectiveness of the agent’s work is a matter of inference from the evidence” per McGregor J in *Sushames v. Cumming* [1962] NZLR 920 at p. 925. Where the agent can show that some act of his was the *causa causans* of the transaction (*Tribe v. Taylor* [1876] 1 CPD 505, 510) or was an efficient cause of the sale (*Miller v. Radford* [1903] 19 TLR 575), he is entitled to his agreed remuneration. Both of these cases were approved in the Privy Council in *Burchell v. Gowrie and Blockhouse Collieries Limited* [1910] AC 614, which itself is a case where the broker was held entitled to recover because he had brought the company into relation with the actual purchaser, although the company had sold behind his back. See also *Symons v. Callil* [1923] VLR 49 (Full Court of Victoria). So where the property was eventually bought not by the lady introduced by the

agent but by her husband as part of a property settlement then being negotiated and on the intimation by the wife that she desired that property, it was held that the husband's action in obtaining the property for his wife had the same effect as a direct approach by the lady to the owners would have had: *Hansen Real Estate v. Jones & Jones* (Supreme Court, Wellington, 16 April 1980, White J - reported *New Zealand Law Journal* [1980] p. 284). We need to refer to only two more cases. In *Green v. Bartlett* [1863] 14 CB (NS) 681, a potential buyer had asked the auctioneer, after the auction sale had not reached the reserved price, for the name of the owner and with the knowledge had purchased the property directly from him. The auctioneer was held entitled to his commission. In *Tong Lee Hua v. Yong Kah Chin* [1979] 1 MLJ 233 this Court considered the case as one of strict construction of the contract between the parties.

It is clear that the claim of the appellants depends on the proper construction to be given to this 31 March Agreement. It recited that they were responsible for the 20 March Agreement and then said that they were relinquishing their rights to the timber-land upon certain terms. By all accounts it was a rather curiously drawn up document. But the consideration was stated in the following terms:

> 1. In consideration of the Second, Third and Fourth Parties relinquishing the rights to the 18,000 acres of forest land the subject matter of the said contract between the First Party and Au Ah Wah dated 20 March 1973 the First Party hereby covenants with the Second, Third and Fourth Parties as follows:
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> (a) to pay the sum of Dollars Fifty (RM50) per acre on the said forest land of 18,000 acres that is: Dollars Nine Hundred Thousand (RM900,000) to the Second, Third and Fourth Parties in equal shares upon the performance of the said contract between Au Ah Wah and Pang Choon Kong that is to say upon the payment of the entire consideration of RM1.2 million to Au Ah Wah subject to the following terms;
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> (b) to pay the Second, Third and Fourth Parties the sum of Dollars Five hundred and Forty thousand (RM540,000) as aforesaid within two (2) weeks on the performance of the said contract with Au Ah Wah; provided that the licence to fell timber for the first thousand acres be issued by the relevant authorities;
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> (c) to pay the Second, Third and Fourth Parties the sum of Dollars Three hundred and Sixty thousand (RM360,000) within six (6) months after the first payment of the Dollars Five hundred and Forty thousand (RM540,000) as aforesaid and provided always that the licence to fell timber on the first thousand acres shall be granted pursuant to the said contract between the First Party and Au Ah Wah and the First Party shall issue a post-dated cheque within six(6) months upon the first payment of the RM540,000 to Second. Third and Fourth Parties, in equal shares.

As we read the Agreement, the payment was for RM900,000 only which though a large sum is but 5% of the profits to be derived from the venture. It was to be paid in two stages and dependent on the transfer of Au Ah Wah's rights and the issue of a licence, the licence being absolutely necessary to give validity to the transfer as the original licence is personal to the holder and it is forbidden by law and by the licence itself to transfer assign or otherwise part with it to third parties. We will

observe that the Agreement is silent as to any other events absolving the respondent from his obligation to pay the agreed sum for the introduction to Au Ah Wah.

Nevertheless the respondent in his defence now said that Au Ah Wah had no rights to the timber-land, they belonged to 30 licencees; it was a term of the 20 March Agreement that it was conditional upon the consent of the 30 licensees and the approval of the Government and these Au Ah Wah had failed to obtain. He said there was a failure of consideration. Further and in the alternative the 31 March Agreement was bad in law.

It is now necessary to turn to the events leading up to the two Agreements. On 1 October 1966 an agreement was entered into between the Government of Pahang and thirty persons (the licensees) whereby the later were given a licence to extract forest produce over an area of 24,000 acres subject to the terms and conditions therein set out. Amongst them was one forbidding the transfer by any means of the rights in the licence: clause 16. At the relevant time, 6,000 acres had been exploited leaving an area of 18,000 with any commercial value. Au Ah Wah claimed to have obtained all the rights to the remaining area. He did not say by what means he did so nor did he produce any document signed by the licensees. In view of clause 16 the nature of those rights might well be questioned. Nevertheless he claimed to have acquired the rights over this area of land and he agreed in the 20 March Agreement to transfer all these rights to the respondent, to whom he was introduced by the appellants. What those rights were did not appear to have been defined anywhere in the Agreement, though the parties thereto did not appear to have been in any doubt about them. But the Agreement was clearly for the transfer of the licensees' interests rights and title to the land and it was represented that Au Ah Wah had the means of effecting this transfer,if not of enforcing it. Clause 6 therefore provides that the respondent should make available to Au Ah Wah a sum of RM1,200,000 for "paying off" the licensees whose names were set out in an enclosure by way of a schedule annexed to the Agreement. It was also agreed that the rights of these licensees were to be transferred to a company to be formed for the respondent by Au Ah Wah who was also then an advocate and solicitor. But for such a transfer to be lawful and effective, it must be with the approval of the Government. Au Ah Wah consequently had to undertake to obtain the approval of as well as the transfer of the rights of the 30 licenses. The time agreed to was 3 months from the date of the contract. The fruits to be harvested by Au Ah Wah on the successful outcome of the venture were fairly substantial. They were fully set out in the Agreement but are of no concern in this appeal.

In the event no company was formed to which all the 30 licensees transferred these rights. This was because of dissensions amongst them. In the words of Au Ah Wah, 12 ran out on him. And on 7 September 1973, Au Ah Wah and the respondent executed a short agreement rescinding the 20 March Agreement. If the matter had stopped here, there clearly could be no claim by the appellants against the respondent. But the mater did not stop at this point.

On 10 November 1973, the Government entered into a new agreement with the 30 licencees for the termination, so-called, of the first Agreement of 1 August 1966 to enable the Government to enter into separate agreements with three companies, Syarikat Hayati Sdn. Bhd., Syarikat Bertapak Sdn. Bhd. and Syarikat Sastiva Bharu

Sdn. Bhd. (Hayati, Bertapak and Sastiva respectively) for the purpose of felling and logging the remaining 18,000 acres. To enable this to be done, this area was sub-divided into 3 as clearly shown on a plan annexed to the agreement. Hayati was to get 6,000 acres, Bertapak 4,800 and Sastiva 7,200 acres. There can be no doubt of the purpose of this agreement from the part played by Au Ah Wah in effecting it. He was the witness for all the thirty licensees. The agreement also provided for the allocation of these licensees to the three Companies. Hayati was allotted 10, Bertapak 8 and Sastiva the remaining 12, who deductively must be the 12 who ran out on Au Ah Wah.

Following this agreement, the Government on 27 May 1974 entered into separate agreements with the three companies for the extracting of forest produce from these areas. Once again Au Ah Wah signed as attesting witness to the execution of the agreements by the directors of the three companies.

A search in the Registry of Companies reveled the following: of those original licensees, only 2 of the 10 allotted to Hayati remained as shareholders. Bertapak also had 2 of the 8 allotted to it. One of the other 6 had died however and it is not known what had happened to his allocation. The full complement of twelve remained with Sastiva, the two had died being substituted by their personal representatives.

It is not however suggested that there is any significance in this as the rights of the licensees had passed to the companies and the question whether the respondent had acquired any rights over the timber area must be determined by an examination of the composition of the three companies. It will be sufficient to observe shortly that in Bertapak and Hayati, the shareholders and the directors include several persons with the same surname as the respondent. Quite a few of them reside at his address. The same is perhaps not true with Sastiva but the curious feature is that the directors reside at Pahang, but the registered office is in Kuala Lumpur and it had a Chinese secretary.

The only conclusion to be reached on this documentary evidence must be that the respondent had obtained the rights certain to the 10,800 acres given to Hayati and Bertapak. As for the 7,200 acres allotted to Sastiva, the respondent admitted that he knew that one Tan Seng Eng had obtained the licenses issued to Sastiva and the documentary evidence in the three agreements made, two on 7 September, and the third on 12 September 1973, is to the effect that whatever benefits were obtained in the matter by Au Ah Wah and Tan Seng Eng, they were all passed over to the respondent and another, through the instrumentality of Au Ah Wah.

On all this evidence, we can only form one conclusion that Au Ah Wah had performed his contract with the respondent and as provided for in the 31 March Agreement (which is the relevant one for construction in the determination of the rights and obligations between the parties) the rights of the appellant had accrued "on the performance of the said contract with Au Ah Wah." The other requirement in the contract was the issue of a first licence to fell 1,000 acres. The evidence of Harun bin Ismail, the Deputy Director of Forestry (PW3) was that at the date of hearing, 10,000 of the 18,000 acres had been worked. The obligation of the respondent to pay the appellants had therefore crystallised. It is true that the negotiations with the original licensees had to negotiate a further channel, but that

did not alter the fact that the respondent came into the picture through the introduction of the appellants, nor the other fact just as clear, that throughout the weaving of the fabric, the hand of Au Ah Wah was seen.

For these reasons, the appeal is allowed with costs here and in the Court below. Judgement will be entered for the plaintiffs as prayed.

Also found at [1983] 2 CLJ 117